1995

State of Utah v. Carol A. Fix : Brief of Appellee

Utah Court of Appeals

Laszlo Daroczi; Deputy Weber County Attorney; Attorney for Appellee.
Martin Custen; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	Priority No. 2
Plaintiff/Appellee,	:	
vs.	:	
CAROL A. FIX,	:	Case No. 950045-CA
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH, THE HONORABLE STANTON M. TAYLOR, DISTRICT JUDGE.

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ORAL ARGUMENT NOT REQUESTED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
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Plaintiff/Appellee,	:	
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JURISDICTION AND NATURE OF PROCEEDINGS

The Court of Appeals has jurisdiction of this appeal pursuant to Section 78-2a-3(2)(f) Utah Code Annotated.

On November 4, 1994, a jury convicted Defendant of Leaving the Scene of an Injury Accident, a class "A" misdemeanor, in violation of § 41-6-31 Utah Code Annotated.

ISSUES PRESENTED AND STANDARD OF APPELLATE REVIEW

1. Was the evidence sufficient to support a verdict of Leaving the Scene of an Injury Accident?

Standard of review: Appellant must marshal all the evidence supporting the jury's verdict, then demonstrate how this evidence, even viewed in the most favorable light, is insufficient to support the verdict. An appellate court will reverse on the basis of insufficient evidence only when the evidence is so inconclusive or improbable that reasonable minds must have entertained a reasonable doubt that the Defendant committed the crime.

2. Did the trial court commit reversible error by excluding evidence of State's witness' intent to sue defendant?

Standard of review: The trial court's ruling is reviewed for abuse of discretion. Appellant must show that the error would have had a substantial influence in bringing about a different verdict.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Section 41-6-31 Utah Code Annotated, Leaving the Scene of an Injury Accident, a class "A" misdemeanor.

Wording not at issue

Rule 608(c), Utah Rules of Evidence: Evidence of bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness . . . by examination of the witness . . .

STATEMENT OF CASE

Defendant/Appellant, Ms. Fix, was driving in Ogden on March 25, 1994, in mid-day. Another driver, Lori BRYAN, felt Defendant was following too close and showed the Defendant the "finger." The Defendant was upset by this and followed Lori Bryan through the streets of Ogden, then up Ogden Canyon and to a day-care center where Lori Bryan was to pick up her child. Some strong words were exchanged before Lori Bryan went into the day-care center, having noted Defendant's license number. Defendant then proceeded to spit at and into Lori Bryan's car.

Normand Knudson was in the yard with his father and heard the verbal exchange and saw the Defendant spitting into the car. He walked toward the Defendant's car as

she began to drive away. He held up one hand to stop her car since the day-care was private property and posted with "No Trespassing" signs. Knudson worked at the day-care and his mother operated it. The Defendant continued to drive forward and hit Knudson who rolled on her hood and landed on his feet falling against a chain link fence. Defendant continued to drive away and did not return. The Deputy Sheriff responding to the call was given the address by dispatch of the departing car's license number. He went to that address and obtained a statement from the Defendant about the incident. Then he went to the scene at the day-care and spoke with Lori Bryan, Mr. Knudson and his father. The Defendant was then charged with Aggravated Assault and Leaving the Scene of an Injury Accident.

THE TRIAL

After Lori Bryan testified, Mr. Knudson testified that he could hear the confrontation between Lori Bryan and the Defendant. He heard Lori say "I've got your license plate, you're on private property. I'm going in the house to call the police and you need to leave." On the defendant's part he heard "lots of profanity." P.1, Vol. 1.

Knudson observed "what appeared to be spitting . . . and within seconds of that the car sped towards me and she hit me and she didn't slow down. She just took off and sped out of the bridge. I pushed myself as much as I could from the side of the car because in my mind I was afraid of being squished between the car or falling into the fence and getting thrown back under the rear tires," P. 62, Vol. 2.

"When I did come off the car, by the time I was able to get turned around to try and get a license plate number . . . all I seen was the very back of the car speeding off

. . . I realized I was going to be hit when s he was coming toward me, I took a couple of steps backward, I put my hand out to try and motion for her," P. 3, Vol 1.

As for Knudson's injuries: "When I jumped in the air and the car hit me on my legs, it threw me onto the hood of the car. I hit pretty hard . . . onto the car with my body and that shoulder," P.65, Vol. 1.

"I slammed the same shoulder into the fence it was all in less than a second . . . I also sustained some injuries to my right knee. I've had problems with my knee dislocating since then," P.66, Vol 1.

Knudson testified he was "in home therapy, as far as stretching and exercising and things like that," P.65, Vol. 1. More on the injures: "I had some minor scrapes on my hands. I was wearing a thick levi jacket. It had some pretty serious scuffs and scrapes on it, but nothing wore through my jacket to my skin on my arms," P. 69, Vol 1.

"I was definitely in a lot of severe pain in my right arm and right shoulder." Knudson testified he sustained bruises but they may not have been visible to the naked eye. "Not the naked eye, I guess. I don't know. I can't see my back . . . I didn't look in a mirror," P.83, Vol. 1.

After Defendant drove away she did not return to the scene. P. 123, Vol. 1.

As to Knudson's bias against defendant, Knudson testified, "This woman is a threat to society," P. 69, Vol. 1. Also, "anybody who would run somebody down for no reason was a threat to society and I was concerned that she could get in her car and put a key in it and go out and hit somebody else. I never met the lady. I didn't know her from anyone and I was very agitated that someone could do something so heinous and still

have the ability to get behind the wheel of a car and go out and do it again to someone else if they choose," P. 71, Vol. 1.

The Deputy also testified about how Knudson felt toward Defendant. "Did Mr. Knudson tell you that he wanted Carol Fix jailed for Attempted Homicide and held without bail?" "He did" replied the Deputy. P. 149, Vol. 1. "Did he state to you that he would find out where Carol lives and take care of the problem himself?" Answer: "He said something to that affect, yes, and I advised him not do so, otherwise there would be charges filed against him," P.150, Vol. 1.

In his closing statement defense counsel said on the issue of Mr. Knudson's injury or lack of injury: "There is no damage to the grille. There is no damage. There is no injury. There is no visible injury. None of the rest matters if there was no injury," P. 214, Vol, 2. "And if that's the amount of pain Mr. Knudson felt from the car, then that's not the kind of pain that's described in these instructions. It has to be substantial pain." P. 215, Vol. 2.

The jury acquitted the Defendant of Aggravated Assault and convicted her of Leaving the Scene of an Injury Accident.

SUMMARY OF ARGUMENT

First Issue: Was the evidence insufficient to support the verdict? Rather than marshalling the evidence supporting the verdict, Defendant marshals the evidence pro and con then argues for a reversal. Defendant urges that an injury suffered in the instant case must be an "objectively observable injury." But defendant did not object to the instruction given nor asked for additional or different instruction on "injury."

Second Issue: Does the trial court's refusal to allow questioning of Knudson re: intent to sue Defendant, warrant a reversal?

It is harmless error since Knudson's bias was already obvious to the jury!

ARGUMENT

Defendant raises the first issue of whether there was sufficient evidence to support the verdict of failure to Remain at the Scene of an Injury Accident. Defense counsel chose to challenge in this appeal the sufficiency of the evidence to support the verdict. The State points out that at the end of the trial Defendant moved to arrest judgement on the very issue of sufficiency of the evidence as to the type and degree of injury suffered by Knudson. That motion was denied. The State submits that the proper recourse would have been to appeal the denial of the motion to arrest judgement.

The State argues that the appellate court can dispose of the first issue even before deciding whether defendant meets the burden of marshaling the evidence. The key is Defendant's argument in the first paragraph on page 21 of the brief. Here Defendant muses about whether the injury suffered should be subjective or objective. The evidence is then marshalled to amplify on this topic.

As to what type or degree of injury is contemplated by the statute of failing to remain at the scene of an injury accident, on page 2 of the brief, defense counsel "could not find any Utah case law on the issue of whether there is an objective or subjective standard for the findings of the jury." Yet defense counsel goes on undaunted, "Either way, it is submitted that there must be objective evidence of injury."

Instruction 19 to the jury reads as follows: "Bodily injury" means physical pain, illness or any impairment of physical condition.

Defendant did not object to said instruction nor offered additional or different instruction on the issue of "injury."

Since Defendant failed to raise this issue at the trial court level he cannot now raise it at the appellate level. "It is a fundamental principle of appellate review that matters not raised at the trial level cannot be raised for the first time on appeal." State in the Interest of M.S., 781 P.2d 1289, 1291 (Utah 1989). See also State v. John, 770 P.2d 994, 995 (Utah 1989).

As to marshaling the evidence: Defense counsel cites the correct standard of review then proceeds to do violence to that standard.

Defendant cites the case of State v. Scheel, 823 P.2d 470 (Utah App. 1991) which does define the standard. "This court has limited authority to examine a jury verdict challenged on the sufficiency of the evidence. We review the evidence and all references which may be reasonably drawn in the light must favorable to the verdict . . . reversing only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the Defendant committed the crime. Furthermore, Defendant must marshall all evidence supporting the jury's verdict and must then show how this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict."

In Defendant's brief under the heading Marshaling the Evidence, defense counsel devotes in a summarized form to the marshaling evidence most favorable to the verdict

an entire paragraph, (page 15, second paragraph of brief), out of more than three and a half pages. The rest of that section is devoted to evidence marshaled to put the Defendant's case in a best light, i.e., "Ms. Fix gave an entirely different version . . . the only evidence of . . . Knudson's . . . injury . . . came from his own testimony . . . Ms. Fix's statement, when read in its entirety, does not support a finding of injury . . . Mr. Fix testified that there was no impact with Normand Knudson . . . she was frightened and left."

In marshaling the evidence defense refers repeatedly to evidence offered by the State's witnesses as not credible. In State v. Romero, 554 P.2d 216 (Utah 1976) also cited by defense, the high court says "Further, this court has maintained that its function is not to determine guilt or innocence, the weight to give conflicting evidence, the credibility of witnesses, or the weight to be given Defendant's testimony. In State v. Goddard, 871 P.2d 540 (Utah 1994) the high court also states, "However, she is not entitled to reversal of her conviction simply because her version of the facts are different from the State's or simply because there are some gaps in the State's evidence. The existence of contradictory evidence does not warrant disturbing the jury's verdict . . . The jury need not accept the Defendant's version of the facts but may disregard it in whole or in part. In essence Goddard urges us to retry the facts of this case on appeal, and we refuse to do so."

In the case of Oneida/SLIC v. Oneida Cold Storage & Warehouse, 236 Utah Adv. Rep 24, the Court of Appeals said "This rigorous standard reflects the doctrine that appellate courts do not sit to retry cases submitted on disputed facts. Accordingly, when

the duty to marshall is not properly discharged, we refuse to consider the merits of challenges to the findings and accept the findings as valid . . . Oneida has failed to marshal the evidence in support of the trial court's factual findings. Rather than bearings it's marshaling burden, Oneida has merely presented carefully selected facts and excerpts of trial testimony in support of its position. Such selective citation to the record does not begin to marshal the evidence; it is nothing more than an attempt to reargue the case before this court - a tactic that we reject."

The State submits that the Defendant here indeed seeks to retry her case before this court by citing carefully selected facts and excerpts of trial testimony in support of her position.

AS TO THE SECOND ISSUE: Did the trial court err in refusing to allow evidence of Normand Knudson's intention to sue Defendant? The State submits that this was harmless error. On Page 98, 99 Vol. 1, the transcript reflects the following exchange:

Mr. Custen: Mr. Knudson, do you intend to sue Carol Fix for money damages?

Mr. Daroczi: Objection, irrelevant.

The Court: Sustained.

Mr. Custen: May I approach?

The Court: No, Sustained.

Mr. Custen: May I be heard outside of the presence of the Jury?

The Court: No, sustained.

Mr. Custen: May I make a record?

The Court: We'll allow you to make a record afterwards.

This exchange was in the presence of the jury.

The State agrees with defense counsel that Rule 608(c) Utah Rules of Evidence, does allow such evidence in as evidence of bias. It was error to exclude it. The issue becomes whether it was reversible or harmless error.

Defense counsel cites on Page 2 of his brief under Standard of Review the case of State v. Hackford, 737 P.2d 200 (Utah '87). Hackford is applicable and the State concedes error in violation of Rule 608(c). The State further submits that the analysis in Hackford is also applicable as to whether the error was harmless. The court in Hackford states, "Although we concede that Lane's testimony was a critical part of the case against Hackford, the jury had sufficient information to fully appraise Lane's biases and motivations . . . therefore, we find beyond a reasonable doubt that the trial court's error was harmless."

In the instant case the jury was well aware from the testimony of Knudson and the Deputy that Knudson was not only biased against but was incensed at the Defendant. Therefore, the court's denial of Defendant's request to show that Knudson was biased by his intent to sue Defendant, caused no harm. Defense counsel also cites the case of State v. Rammel, 721 P.2d 498 (Utah 1986) which is helpful on this issue as well. In Rammel, the high court states, "Where it is unlikely that the excluded testimony prejudiced the defendant's rights in a substantial manner, the error is harmless . . . courts have found no prejudice where information that may be brought out by further questioning was already before the jury either from the testimony of others or by implication from the witness' own testimony." In Rammel the "jury was well aware of Herman's possible

motivation for testifying as he did . . . Herman admitted that he had some very angry feelings about what had happened. The jury also heard, and was not told to ignore, the question posed as to whether Herman had instituted civil proceedings against Defendant. We therefore conclude that although it was error to limit the cross-examination as to Herman's bias and motive, the error was not prejudicial because additional cross-examination would not have had a substantial influence to bring about a different verdict."

The State submits that the fact situation on this issue is nearly identical with the instant case: The jury heard and was not told to ignore defense counsel's question whether Knudson intended to sue Defendant; the jury was well aware that Knudson had some very angry feelings about what had happened. The State asks that the court follow the reasoning and ruling of Rammel.

RELIEF SOUGHT

The State asks that the court affirm Defendant's conviction for Defendant's failure to meet the standard of review as to both issues raised by the Defendant.

ORAL ARGUMENT IS NOT REQUESTED

Respectfully submitted this 12th day of June, 1995.

LES DAROCZI
DEPUTY WEBER COUNTY ATTORNEY

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing BRIEF OF APPELLEE to:

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DATED this 13 day of June, 1995.

SECRETARY